IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (LODGING) NO. 1138 OF 2007

Hamid Sh. Dawood Kagadi)
of Mumbai, Indian Inhabitant,)
Occupation: Service (Sales Tax Officer))
residing at C-5, 2/4/2, Sector V,)
Gangotri Apartment, CBD-Belapur,)
Navi Mumbai-400 614).. Petitioner

versus

1. The Commissioner of Sales Tax,)
Maharashtra State, Vikreekar Bhavan,)
Mazgaon, Mumbai.)

2. The Additional Commissioner of Sales Tax,)
Maharashtra State, Vikreekar Bhavan,)
Mazgaon, Mumbai.)

3. The Education Officer,)
The Municipal Corporation of Gr. Mumbai)
Hindu Colony, Dadar, Mumbai.)

4. The Head Master, Worli Koliwada Lower)
Primary Marathi Medium School, Worli)
Koliwada, Worli, Mumbai-400 018)

5. The Head Master, Jantha Sikshan Sanstha's)
High School, Worli, Mumbai-400 018.)

6. The Maharashtra State Board of)
Secondary Education, Pune Divisional)
Through the Divisional Secretary, Pune.)

7. The State of Maharashdtra, through the)
Principal Secretary, Finance Department,)

Mantralaya, Mumbai-400 032.)..Respondents

Mr. S.D. Rupwate for the petitioner.
Ms. S.M. Dandekar, Assistant Government Pleader, for the State.

CORAM: **SWATANTER KUMAR, C.J.** &
S.C. DHARMADHIKARI, J.

Judgment reserved on: June 27, 2007
Judgment delivered on: July 19, 2007

JUDGMENT (Per Swatanter Kumar, C.J.):

The petitioner, who is employed in the office of the Commissioner of Sales Tax and is presently posted at D-1199, Ghatkopar Division, Navi Mumbai as Sales Tax Officer, submitted an application to the competent authority in his office on 11th April, 2007, requesting that the date of birth in his service record be changed on the basis of the evidence that he had furnished along with the said application. Having failed to receive any response to his representation, the petitioner made further representations to respondent Nos. 3 and 4 on 25th April, 2007, but of no consequence. This resulted in filing of the present writ petition wherein the petitioner has prayed for issuance of appropriate writ, order or direction to the respondents directing them to change his date of birth in the service book and grant consequential

benefits to him, including continuity of further services.

2. The relevant facts are that, according to the petitioner, he was born on 5th December, 1950 in Mumbai at Haji Sabu Siddique Hospital. He claims to have been admitted to first standard in June, 1956, whereafter he completed his primary education and joined Janta Sikshan Sanstha's High School at Worli, Mumbai, and completed his secondary level education in the year 1968. The date of birth declared in his school certificate as well as which continued even after he obtained a Degree in Commerce in the year 1970 was 5th December, 1950. He was recruited as a Junior Clerk in the office of the Labour Commissioner for Workmen's Compensation on 20th November, 1970. He received various promotions and on 30th October, 2002 he was promoted as a Sales Tax Officer.

3. On 11th February, 2007, the petitioner came across a news item in Marathi daily that the Court in the case of *Gorakhnath S. Kamble* vs. *The State of Maharashtra (*Writ Petition No. 6531 of 2006), decided on 19th January, 2007, the date of birth was permitted to be changed and as the case of the petitioner was identical he made an application on 5th March, 2007 to the Municipal Corporation of Greater Mumbai, G/North Ward, for correction of his date of birth. The Sub-Registrar of

Birth and Death, G/North Ward on 5th April, 2007, informed the petitioner that his real date of birth was 5th December, 1950. On the basis of the information received from that office, the petitioner made a representation to respondent No.2 and even higher authorities for change of date of birth. This request was not accepted but at the same time the respondents did not respond to the representations of the petitioner at all and date of birth of the petitioner was not changed, resulting in filing of the present petition.

4. According to the petitioner, after having read the judgment of the Court in the case of Gorakhnath (supra), he had approached the Corporation for correction of date of birth and he was informed that his date of birth was 5th December, 1950. In the service record, the date of the petitioner has been recorded as 15th June, 1949. It may be noticed here that in the representation which the petitioner made to the respondents on 11th April, 2007, the reasons stated by him was that his age was incorrectly shown at the instance of the teachers as the school admissions were not given at that time if the students seeking admission was not 7 years old. In order to meet the requirement for admission to the school, the petitioner's date of birth was incorrectly described by his parents, though the petitioner was born on 5th December, 1950. It is

obvious that the petitioner and his parents all throughout knew that the date of birth of the petitioner had been incorrectly recorded in the school. There is no reason why the petitioner ought not to have approached the Corporation and his department for correction of the date of birth for all the years when the petitioner was in service. Now the petitioner is to retire after attaining the age of superannuation (58 years) in December, 2007, and now at the fag end of his service career he has woken up and claims advantage of his own wrong.

5. Learned counsel appearing for the petitioner relied upon the Division Bench judgment of this Court in the case of Gorakhnath (Supra). The reliance placed upon the said judgment is of no help to the petitioner inasmuch as the facts and circumstances of that case were totally different and has no application to the facts and circumstances of the present case in view of the settled principle of precedent. In fact, the said judgment has been referred to by this Court where after considering the law in great detail on the subject the prayer similar to that made in the present petition was declined in the cases of *Kakasaheb Shidu Mhaske* vs. *The Municipal Corporation of Greater Mumbai* (Writ Petition No. 391 of 2007) decided on 19th April, 2007 and *Ranjana Lau Salakar* vs. *State of Maharashtra and others (*Writ Petition (Lodging) No.

1099 of 2007, decided on 21st June, 2007. It may be useful to refer to the following findings recorded by the Division Bench in the case of Ranjana Salakar (supra).

> " In paragraph 8 of the writ petition the petitioner has stated that during discussions in 2004 between the family members and relatives, she came to know that she was born in 1951 and not in 1949 and one of the friends of the petitioner, who was elder to her, was still in service and was still to retire. These facts have persuaded her to correct the documents and accordingly made application to change her date of birth in the year 2005. These averments lack bona fide and cannot be given credence at the fag end of the service career. It may be appropriate for us to refer to a Division Bench decision of this Court in the case of *Kakasaheb Shidu Mhaske* vs. *The Municipal Corporation of Greater Mumbai* (Writ Petition No. 391 of 2007) decided on 19th April, 2007 where in somewhat similar circumstances the Court dealt with both the contentions of prejudice as well as undue delay and version put forward by the petitioner in that case being lack of bona fides and held as under:-
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> 6. It is the settled rule of law that correction in date of birth at the fag end of the career cannot be permitted unless and until the Rules give a right to an employee. The documents produced by the petitioner, particularly Exhibit-B, show the date of birth of brother and sisters of the petitioner. It is difficult to believe that date of birth is correctly stated of all the children in those records which also shows the date of birth of the petitioner as 1st June, 1949. The learned counsel appearing for the petitioner relied upon a judgment of the Division Bench of Kerala High Court in the case of *Krishnarajan* vs. *Doraswamy Chettiar and others,* AIR 1966 Ker. 305, to contend that the entries in these records are best evidence of the date of birth and can safely be accepted unless they are shown to be wrong. As the entries were altered by the authorities in exercise of their powers, the Corporation should have accepted the same when produced. This argument is

without any substance. Firstly, the judgment on facts have no application to the present case. Secondly, the judgment does not provide for an absolute right in favour of an employee to claim alteration of the date of birth in the service records on the basis of such entry. In fact, the Court has specifically used the words and these are relevant but rebuttable that correct age of the petitioner had been shown by him in his service records by an undertaking and furthermore by furnishing documentary evidence.

7. We may also refer to a Division Bench judgment of the Delhi High Court in the case of *Brigadier Ashok Kumar Singh* vs. *Union of India*, decided on July 13, 2006, where the Court in somewhat similar circumstances held as under:-

> "It is difficult even for the Court to believe that the petitioner would have disclosed and written in his own handwriting incorrect date of birth repeatedly at different times i.e. In the year 1971 as well as in 1972. It may also be noticed that in the Indian Military Academy Examination form the petitioner again in column 7 had declared his date of birth as 16.8.51. In fact, the petitioner would be estopped from challenging the correctness of the date of birth as filled in by him at different occasions in his own hands, by his own conduct. Learned counsel appearing for the petitioner heavily relied upon the judgment of the Supreme Court in the case of *Union of India vs. C. Rama Swamy and ors.* 1997 Vol. 4 SCC 647 to contend that the respondents ought to take into consideration the corrected date of birth of the petitioner in furtherance to the certificate issued by the Secondary Board. This contention is void of any substance firstly because C. Ramaswamy was a member of the IPS and was governed by the relevant rules applicable to the Indian Administrative Services. Rule 16-A provides for determination of date of birth and sub-Rule 4 (a) indicates that every

member of the service holding office immediately before the commencement of the All India Services Commencement Rules, 1971, shall within three months from such declaration make a declaration as to the date of birth. Such a chance was given for correcting the date of birth on the amendment of the said rules. The Supreme Court also held that sub-Rule 4 is related to correction in date of birth in the service record of the officer resulting from a bona fide clerical mistake in acceptance of date of birth. The facts and question of law before the Supreme Court was distinct and different than in the present case. In the present case not only that the petitioner has repeatedly disclosed his date of birth as 15.8.51 but had acted thereupon even by taking the subsequent examinations. In other words, not only that the respondents had accepted the date of birth declared by the petitioner which was supported at the relevant time by a certificate issued by the Secondary school, but even the petitioner himself accepted and acted upon the fact that his date of birth was 15.8.51. The subsequent conduct of the parties to the event, is a relevant consideration before the Court and can tilt equities between the parties.

8. It is difficult to provide a straight-jacket formula which would be uniformally applicable to the cases without reference to peculiar facts and circumstances of each case. Whenever a person joins service and makes declaration of his date of birth in his own handwriting, normally he cannot go back from such an admission unless there were exceptional and compelling circumstances of a bona fide mistake. In the case of *Harchand Singh v. Punjab State* , 2004 (4) SLR (Pb. And Hr.) 349, the court dismissed the petition on the ground that the application for correction had been made after 20 years and the claim of the petitioner was belied to his own earlier documents and in fact, he took two years advantage in entering the Government service as he could not enter the service unless he was 18

years old. In the case of *P.S. Bheemeswara Rao v. Regional Joint Director of Intermediate Education*, 2004 (3) SLR (Andhra Pradesh) 347, the court also stated the principle that a party at the fag end of his career cannot seek correction of entries in the service record as entry regarding date of birth in service record is final. Of course, it may have some exceptions.

9. Latches has been a very material factor in accepting or denying a relief to the petitioner raising such a claim. In the case of *Sheo Pujan Lal v. State of Bihar,* 2004 (1) SLR (Patna) (DB) 593, the court held that a petitioner, who had declared his age in the matriculation certificate and such a date was entered in the service record, later on, cannot be heard to argue that there was a different date of birth more advantageous to the petitioner and he had not declared correct date of birth in his certificate. The Supreme Court in the case of *State of Punjab* v. *S.C. Chadha*, 2004 (2) SLR (SC) 741 held as under.

> "Most of the States have framed statutory rules or in absence thereof issued administrative instructions as to how a claim made by a public servant in respect of administrative instructions as to how a claim made by a public servant in respect of correction of his date of birth in the service record is to be dealt with and what procedure is to be followed. In many such rules a period had been prescribed within which if any public servant makes any grievance in respect of error in the recording of his date of birth, the application for that purpose can be entertained. The sole object of such rules being that any such claim regarding correction of the date of birth should not be made or entertained after decades, especially on the eve of superannuation of such public servant. In

> the case of *State of Assam vs. Daksha Prasad Deka*, 1970 (3) SCC F 624 : (1971) (2) SLR 14 (SC),this Court said that the date of the compulsory retirement must in our judgment, be determined on the basis of the service record and not on what the respondent claimed to be his date of birth, unless the service record is first corrected consistently with the appropriate procedure."

In the case of *Government of Andhra Pradesh vs. M. Hayagreev Sarma*, 1990 (2) SCC 682 : (1990) (2) SLR 742 (SC) the A.P. Public Employment (Recording and Alteration of Date of Birth) Rules, 1984 were considered. The public servant concerned had claimed correction of his date of birth with reference to the births and deaths register maintained under the Births,Deaths and Marriages Registration Act, 1886. The Andhra Pradesh Administrative Tribunal corrected the date of birth as claimed by the petitioner before the Tribunal, in view of the entry in the births and deaths register ignoring the rules framed by the State Government referred to above. It was, inter alia, observed by this Court : "The object underlying Rule 4 is to avoid repeated applications by a government employee for the correction of his date of birth and with that end in view it provides that a government servant whose date of birth may have been recorded in the service register in accordance with the rules applicable to him and if that entry had become final under the rules prior to the commencement of 1984 Rules, he will not be entitled for alteration of his date of birth." As observed by this Court in *State of Tamil Nadu vs. T.V. Venugopalan*, 1994 (6) SCC 302: (1994) (4) SLR 626 (SC) and *State of Orissa and others v. Ramanath Patnaik,* 1997 (5) SCC 181: (1997) (2) SLR 799 (SC) when the entry was made in the service record and when the employee was in service he did not make any attempt to have the service record corrected, any amount of evidence produced subsequently is of no consequence. The view expressed in R.

Nirubakaran's case (supra) was adopted.

In view of the aforesaid, the inevitable conclusion is that the High Court was not justified in interfering with the orders of the Government and directing correction of the date of birth in the service records of the respondent as now claimed by him. The appeal is allowed but without any order as to costs.

10. The above enunciated principles clearly demonstrate that a discretion is vested in the appropriate authorities of the respondents to accept or decline the request of the petitioner for change of date of birth. Unless the discretion is exercised arbitrarily or offends specific rules which are to the benefit of the employee, the court would not normally disturb such discretion. In the present case, the petitioner is a senior officer and was expected to act with greater care in regard to the matter of his service record. The petitioner consistently accepted and acted upon his date of birth being 16.8.51 by his declaration in writing and otherwise. We are unable to see any patent error in exercise of discretion by the respondents and particularly in face of instruction dated 21.4.64 issued by the Government."

8. Similar view was taken by the Jammu and Kashmir High Court in the case of *Abdul Rashid Sogami* vs. *State of Jammu & Kashmir*, decided on 28th September, 2000, where the Court clearly stated the principle that a date of birth which has been authenticated by the employee himself in his service record cannot be corrected at the fag end of the service and the Court held as under:

"The plea of learned counsel for the petitioner that he came to know about the wrong date of birth recorded in the service record in November, 1999 is misplaced as the petitioner has signed the service book when it was prepared at commencement of the service and signed the relevant column of the service book in token of the correctness of the entry recorded in the service book.

The petitioner is a qualified person and he cannot take shelter that he was not aware of the date of birth recorded in the service record. Supreme Court in *Union of India* v. *Saroj Bala*, 1996 SC 1000 has held that candidate belonging to educated family entering service after competing in All India Service Examination and remaining in Service for 18 years is not entitled to seek correction of date of birth.

It is settled proposition of law that the public servant who approaches the court, like the petitioner, at the fag end of service isn't entitled to seek correction of the date of birth as pronounced by the Supreme Court in *Burn Standard Co. vs. Dinabandhu Majundar,* AIR 1995 SC 1500, holding that:

> "The fact that an employee of Govt. or its instrumentality who will be in service for over decades, with no objections whatsoever raised as to his date of birth accepted by the employer as correct, when all of a sudden comes forward towards the fag end of his service career with a writ application before the High Court seeking correction of his date of birth in his service record, the very conduct of non-raising of an objection in the matter by the employee in our view should be a sufficient reason for the High Court not to entertain such applications on grounds of acquiescence undue delay and laches. Moreover discretionary jurisdiction of the High Court can refer be said to have been reasonable and judicially exercised if it entertains such writ petition, for no employee, who had grievance as to his date of birth "service and leave record" could have genuinely waited till the fag end of his service career to get it corrected by availing of the extra-ordinary jurisdiction of a High Court. Therefore, we have no hesitation in holding

> that ordinarily High Court should not, in exercise of its discretionary writ jurisdiction, entertain a writ application/petition filed by an employee of the Government or its instrumentality towards the fag end of his service, seeking correction of his date of birth entered in his "Service and Leave record or Service Register with an avowed object of continuing in service beyond the normal period of his retirement."

The date of birth of the petitioner supplied by him to the respondents has been recorded in the service record of the petitioner at the commencement of the employment. Till 1999 the petitioner has not challenged the recorded date of birth in the service book which has been also in the notice of the petitioner as he has also put his signatures on the relevant page on the service book wherein the date of birth of the petitioner has been recorded. In such a situation the principle of Estoppel applies that the petitioner cannot seek change of Date of Birth in view of the law laid down by the Supreme Court in 1997 in case *Union of India vs. Rama Swami* reported in 1997 SC page 2057, para 25 and 26 which are extracted below:-

> "25. In matters relating to appointment to service various factors are taken into consideration before making a selection or an appointment. One of the relevant circumstances is the age of the person who is sought to be appointed. It may not be possible to conclusively prove that an advantage had been gained by representing a date of birth which is different than that which is later sought to be incorporated. But it will not be unreasonable to presume that when a candidate, at the first instance, communicates a particular date of birth there is obviously his intention that his age calculated on the basis of that date of birth

> should be taken into consideration by the appointing authority for adjudging his suitability for a responsible office. In fact, where maturity is a relevant factor to assess suitability, and older person is ordinarily considered to be more mature and therefore, more suitable. In such a case, it cannot be said that advantage is not obtained by a person because of an earlier date of birth, if he subsequently claims to be younger in age, after taking that advantage. In such a situation, it would be against public policy to permit such a change to enable longer benefit to the person concerned, this being so we find it difficult to accept the broad proposition that the principle of Estoppel would not apply in such a case where the age of person who is sought to be appointed may be a relevant consideration to assess his suitability."

5. In the light of the above principles, we may refer to the provisions of Rule 38 of the Rules. It is obligatory upon the department to correctly record the date of birth of an employee in the service book. While recording the date of birth, they have to follow the prescribed procedure. The entry made in the service record is treated as final. In terms of clause (f) of Rule 38 (2), when once an entry of age or date of birth has been made in a service book, no alteration of the entry should thereafter be allowed, unless the conditions stated therein are satisfied. In the present case, there was neither any clerical error nor mistake on the part of a person other than the individual in question. The instructions further postulate that normally no application for alteration of the entry regarding date of birth as recorded in the service book shall be entertained after a period of five years commencing from the date of which entry is made in the service records. The petitioner did not take any steps for correction of her date of birth despite the fact that the entry in the service record was made by the petitioner in her

own handwriting and signatures. The story put forward that the petitioner came to know of her correct date of birth during a discussion which took place in the year 2004 does not inspire confidence in the mind of the Court. The general rule is that entry once recorded in the service record has to be treated as final and any alteration thereto is an exception to the Rule. To meet the exception, the petitioner should strictly satisfy the ingredients of the provisions. In addition thereto, the application for such variation has to be moved within the prescribed period of limitation and has also to be bona fide. In our opinion, the application of the petitioner does not satisfy these ingredients. The circular dated 3rd March, 1998, at Exhibit-M to the petition, issued by the Government is also of no help to the petitioner as, according to the said circular, the practice to change the date of birth without verifying the documentary evidence was found to be improper and the date of birth should be changed with reference to the acceptability of the entry of date of birth in the birth and death register. In the present case, in the year 2004, no such evidence was produced by the petitioner and it is these averments which have come up only in the year 2007 when the petitioner submitted a second application knowing that she is going to retire soon. It is not in dispute before us that the petitioner has actually superannuated from service on 1st June, 2007, after rendering nearly 35 years of service. The petitioner has already enjoyed her full tenure of service and even if now her contention is to be accepted, for the sake of argument, then the petitioner has already taken benefit of two years by disclosing her incorrect date of birth as 18th May, 1949, while joining service in the year 1972. In these circumstances, we are unable to find any jurisdictional or other error in the impugned orders. We are also of the considered view that no prejudice has been caused to the petitioner.

6. Reliance placed by the petitioner upon a Division Bench judgment of this Court in the case of *Gorakhnath S. Kamble* vs. *The State of Maharashtra and others* (Writ Petition No. 6531 of 2006) decided on January 19, 2007, is again of no assistance to the petitioner as the order therein was passed on the facts of that case which are clearly distinguishable and, in any case, in that case the Court by

noticing the facts, disbelieved the respondents' contention by holding that the petitioner therein would have been admitted in the first standard at the age of 13 years would be highly improbable and as such accepted the case of the petitioner.

7. The learned Senior Counsel appearing for respondent Nos. 4 to 6 has also relied upon the judgment of the Supreme Court in the case of *Union of India and others* vs. *Mrs. Saroj Bala* (AIR 1996 SC 1000) to contend that once the candidate who was educated and entered the service by making disclosure of certain facts which, according to the petitioner therein, were correct at that time could hardly seek correction of date of birth after rendering 18 years of service.

8. Reference can also be made to a very recent judgment of the Supreme Court in the case of *State of Gujarat and others* vs. *Vali Mohmed Dosabhai Sindhi*, reported in (2006) 6 SCC 537, where the Court enunciated the principle that onus is on the applicant to prove about the wrong recording of his date of birth in his service record and he is expected to satisfy the authorities of such mistake. Even then, the Court or the Tribunal has to satisfy itself that essentially such incorrect entry has resulted in real injustice to the applicant and such correction of the date of birth has to be made in accordance with the prescribed procedure and within the time specified under the Rules. While accepting the appeal of the State, the Court dismissed the writ petition praying for correction of date of birth which had been allowed by the High Court. In the present case, the request to the department for correction of the date of birth has been made after considerable delay and also there is no grave injustice being caused to the petitioner as she had sought the employment taking the benefit of her date of birth being 1949.

6. In the present case, the petitioner has approached the Court of law at the fag end of his service career and despite being aware of

the alleged incorrect date of birth being recorded in his service records, he made no efforts to take steps in accordance with the Rules. On the contrary, he enjoyed one year's extra service as he had entered into service in the year 1970 itself. Having taken advantage of the requisite age at the time of entry in his school and the service, now he cannot be permitted to turn back and take a contrary stand, that too to the prejudice of the respondent department.

7. For the aforesaid reasons, we are unable to find any merit in the writ petition. The same is dismissed, leaving the parties to bear their own costs.

CHIEF JUSTICE

S.C. DHARMADHIKARI, J.